

2
CASE NO. 89-1329

FILED
MAR 13 1990
JOSEPH F. SPANOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

ROBERT ALLEN WILLIAMS,
Petitioner,

v.

ILLINOIS CENTRAL GULF RAILROAD COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

BRIEF OF RESPONDENT

MICHAEL C. QUILLEN
(Counsel of Record)

SAMUEL M. HILL
CABANISS, JOHNSTON, GARDNER,
DUMAS & O'NEAL
1700 AmSouth-Sonat Tower
P. O. Box 830612
Birmingham, Alabama 35283-0612
(205) 252-8800

*Attorneys for Illinois
Central Railroad Company
Respondent*

21 pp

QUESTION PRESENTED FOR REVIEW

Whether the Supreme Court of Alabama correctly affirmed the denial of a new trial motion which alleged inadequacy of the verdict in this Federal Employers' Liability Act case, where the applicable pure comparative negligence standard, coupled with evidence of the plaintiff's negligence, explains the verdict.

CERTIFICATE OF INTERESTED PARTIES

Counsel of record for Respondent, Illinois Central Railroad Company, in accordance with Rule 29.1 of the Rules of the Supreme Court of the United States, effective January 1, 1990, certifies that the following parties have an interest in the outcome of this case.

1. The Honorable Arthur J. Hanes, Jr., Judge, the Circuit Court of Jefferson County, Alabama.
2. Illinois Central Railroad Company, Respondent.
3. Illinois Central Corporation.
4. Prospect Group Incorporated
5. Michael C. Quillen, attorney with the firm of Cabaniss, Johnston, Gardner, Dumas & O'Neal, for Respondent, Illinois Central Railroad Company.
6. Samuel M. Hill, attorney with the firm of Cabaniss, Johnston, Gardner, Dumas & O'Neal, for Respondent, Illinois Central Railroad Company.
7. Robert Allen Williams, Petitioner.
8. Frank O. Burge, attorney with the firm of Burge & Wettermark P.C., for Petitioner.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
CERTIFICATE OF INTERESTED PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR DENYING THE WRIT	5
I. INTRODUCTION	5
II. THE ALABAMA COURTS HAVE NOT IMPROPERLY PLACED THE BURDEN OF PROVIDING A REASONABLY SAFE WORKPLACE ON THE PETITIONER	7
III. THE CLAIM PRESSED IN THE PETI- TION IS SO INSUBSTANTIAL AS TO PRECLUDE THIS COURT FROM TAK- ING JURISDICTION	12
CONCLUSION	15

TABLE OF AUTHORITIES

CASES	Page
<i>Atchison T. & S.F. Ry. Co. v. Ballard</i> , 108 F.2d 768 (5th Cir.) cert. denied, 310 U.S. 646 (1940).....	9
<i>New Orleans Water Works Co. v. Louisiana</i> , 185 U.S. 343 (1901).....	12
<i>Nickell v. Baltimore & O.R. Co.</i> , 347 Ill. App. 202, 106 N.E.2d 738 (1952).....	9
<i>Parker v. McLain</i> , 237 U.S. 469 (1914)	12
<i>Seaboard Railroad v. Gillis</i> , 294 Ala. 726, 321 So. 2d 202 (1975).....	10
<i>Shenker v. B. & O. Railroad Co.</i> , 374 U.S. 1, 83 S.Ct. 1667, 10 L.Ed. 2d 709 (1963)	10
<i>St. Joseph & Grand Island Railroad v. Steele</i> , 167 U.S. 659 (1897).....	12
<i>Tennant v. Peoria & P.U.R.R. Co.</i> , 321 U.S. 29, 64 S.Ct. 409, 88 L.Ed. 520 (1944)	9
<i>Texas & Pacific Railroad Co. v. Archibald</i> , 170 U.S. 665 (1898).....	10
<i>Wabash Railroad v. Flannigan</i> , 192 U.S. 29 (1903) ...	12
<i>Wilson v. Norfolk and Western Ry. Co.</i> , 109 Ill. App. 3d 79, 440 N.E.2d 238 (1982)	9
STATUTES	
28 U.S.C. § 1257.....	2
45 U.S.C. § 51.....	1,3
45 U.S.C. § 53.....	3

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

ROBERT ALLEN WILLIAMS,
Petitioner,

v.

ILLINOIS CENTRAL GULF RAILROAD COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

BRIEF OF RESPONDENT

OPINIONS BELOW

The opinion of the Supreme Court of Alabama is reported as *Ex Parte Williams*, 554 So. 2d 440 (Ala. 1989) and the opinion of the Alabama Court of Civil Appeals is reported as *Williams v. Illinois Central Gulf Railroad*, 554 So. 2d 437 (Ala. Civ. App. 1989). No opinion was issued by the trial court, Judge Arthur J. Hanes, Jr., for the Circuit Court of Jefferson County, Alabama.

JURISDICTION

The Petitioner seeks review of the decision of the Supreme Court of Alabama, issued on November 17, 1989, and reported at 554 So. 2d 440 (Ala. 1989). This action was filed pursuant to the Federal Employers' Liability Act, 45 U.S.C.

§ 51 *et seq.* This Court's jurisdiction to issue the writ is alleged to be pursuant to the terms of 28 U.S.C. § 1257. The Respondent maintains that this Court lacks jurisdiction because the issue made the subject of the petition is so insubstantial as to preclude this Court from taking jurisdiction.

STATUTES INVOLVED

45 U.S.C. § 51.

SECTION 51. Liability of common carriers by railroad, in interstate or foreign Commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce

and shall be considered as entitled to the benefits of this chapter.

★ ★ ★

45 U.S.C. § 53

SECTION 53. Contributory negligence; diminution of damages

In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

STATEMENT OF THE CASE

Judge Holmes' statement of the facts in his opinion for the Alabama Court of Civil Appeals succinctly sets out the relevant facts necessary for disposition of the petition for certiorari. The Illinois Central Railroad Company (hereinafter "Illinois Central") adopts that court's statement and reproduces it below for the convenience of this Court.¹

This is a Federal Employers' Liability Act (FELA) case. 45 U.S.C. §§ 51-60 (1982).

¹ The Illinois Central adds only a response to Williams' statement in his petition that: "In argument, ICG's counsel urged \$35,000.00 to \$36,000.00 as being reasonable damages" (Williams Petition at 4) by noting that counsel also urged no recovery.

Williams sued his employer, Illinois Central Gulf Railroad Company (ICG), asserting negligence on the part of ICG which resulted in injuries to Williams. ICG denied liability and alternatively asserted Williams's contributory negligence as a defense to its liability. The jury returned a general verdict in favor of Williams in the amount of one dollar (\$1). Williams filed a motion for a new trial based on inadequacy of damages, which was denied. Williams, through able and distinguished counsel, appeals, and we affirm.

The dispositive issue on appeal is whether the trial court abused its discretion in denying Williams's motion for a new trial.

The pertinent facts as revealed by the record are as follows: Williams was employed as a head brakeman with ICG at the time of his injury. At approximately 10 P.M. on December 4, 1985, Williams was attempting to "throw" a track switch (a heavy steel device used to allow trains to move from one track to another). After Williams had unlocked the track switch, he grabbed the handle of the switch and attempted to turn or "throw" the switch. When he pulled on the handle, Williams's hands slipped off and he fell backwards. After he fell, Williams noticed grease covering his gloves and the switch handle.

Williams completed his work for the night and prepared an accident report. On the report the cause of the accident was listed as "handle on switch was heavily greased." Further, the report stated that the equipment was defective "because of excessive grease on handle of switch." The record also indicates that the handle was hard to turn.

The record further reveals testimony that the grease on the handle was not the type the railroad used to lubricate switches and that the switch appeared to have been vandalized. Additionally, there was testimony that it is the responsibility of the men working

to inspect the equipment and tools that they work with to be sure that they are safe to use.

554 So. 2d at 438-39.

The Alabama Court of Civil Appeals received briefs and heard oral argument on the issue of the inadequacy of the verdict. On March 29, 1989, the court ruled that Judge Hanes, the trial court, had not abused his discretion in refusing to grant a new trial. On May 3, 1989, the Alabama Court of Civil Appeals denied Williams' motion for a rehearing.

On May 18, 1989, Williams filed a Petition for a Writ of Certiorari to the Alabama Court of Civil Appeals with the Supreme Court of Alabama. After briefing, the Supreme Court of Alabama granted the petition on July 6, 1989. On November 17, 1989, that court quashed the writ as improvidently granted. Williams filed the present petition on February 14, 1990.

REASONS FOR DENYING THE WRIT

I. INTRODUCTION

The issue Williams presented to the trial court and the Alabama appellate courts for post-trial review questioned the adequacy of the damages awarded by the jury. The Illinois Central contends that this is necessarily the issue which must be presented to this Court.

Petitioner Williams himself on motion for new trial and appeal framed the issue for review as the adequacy of damages until the Alabama Court of Civil Appeals decided the issue against him.² When the Alabama Court of Civil Appeals

² The petition for certiorari filed in this Court also betrays Williams' belief that the real issue concerns the adequacy of the damages awarded and the propriety of the denial of the motion for a new trial. In the "Statutory Provisions Involved" section of his petition, Williams sets forth the language of 45 U.S.C. § 53 (concerning the effect of contributory negligence) and 45 U.S.C. § 54 (concerning FELA assumption of risk doctrine). While these sections of the FELA are certainly relevant to an analysis of whether the damages awarded were adequate, they are not relevant to the question presented by Williams.

handed down its decision, Williams changed his approach and began to attack the analysis of that court. He now says that court placed the burden on him to provide himself a safe place to work—the “burden-shifting” issue. Williams now attempts to bring this issue, and this issue only, to this Court.

The burden of an employer subject to the FELA to provide a reasonably safe place for employees to work was not in issue at trial. Williams’ statement in his Petition that this is the question presented for review is an effort to foist a non-issue on the Court. Williams does not argue that the jury was wrongly instructed, nor can he so argue. This was not an issue presented to or decided by the Alabama Court of Civil Appeals.³ It was certainly not an issue addressed by the Supreme Court of Alabama which quashed Williams’ writ of certiorari.⁴

By contending that the “burden-shifting” issue is one that can be presented for review by this Court, Williams is asking the Court to indulge in a fiction which requires the willing suspension of disbelief. Williams asks this Court to believe that the Alabama Court of Civil Appeals addressed this issue which was not presented to it and to which it did not write. He asks this Court to believe that the Alabama Court of Civil Appeals misconstrued decades of FELA precedent and held an employee has the sole responsibility to provide himself with a safe workplace. Finally, Williams expects this Court to believe that the Supreme Court of Alabama blinked at this tremendous legal error.⁵ The mere statement of Williams’ argument reveals its implausibility.

³ The Alabama Court of Civil Appeals described the issue presented to it: “The only issue we must address in this instance pertains to the amount of the award. However, the question is not whether we think the award was low, but whether the trial court abused its discretion in denying William’s motion for a new trial.” 554 So. 2d at 439.

⁴ The majority decision of the Alabama Supreme Court was rendered without an opinion. 554 So. 2d at 440. The dissenting justices, speaking through Justice Jones, wrote a lengthy opinion addressing the amount of the damages awarded. 554 So. 2d at 441. No member of the court addressed the burden-shifting argument urged on them by Williams.

⁵ Because the Alabama Supreme Court quashed its writ of certiorari without an opinion, Williams’ attacks on the Alabama courts are limited to the opinion issued by the Alabama Court of Civil Appeals as affirmed by the action of the Alabama Supreme Court.

In response to Williams' petition for a writ of certiorari, the railroad argues that the Alabama courts have not by their holdings in this case improperly shifted the responsibility for the safety of the workplace from the Illinois Central to Williams. The railroad further maintains that Williams' fictional burden-shifting issue creates no federal question of which this Court can take jurisdiction.

II. THE ALABAMA COURTS HAVE NOT IMPROPERLY PLACED THE BURDEN OF PROVIDING A REASONABLY SAFE WORKPLACE ON THE PETITIONER.

In his petition for a writ of certiorari, Williams argues that the Alabama courts have wrongly placed the burden on him to provide himself a reasonably safe workplace. His sole basis for this argument is a sentence fragment from the Alabama Court of Civil Appeals opinion wherein the court was reviewing the evidence presented to the jury. The language relied upon, emphasized below, appears in the final paragraph devoted to reviewing the evidence:

The record further reveals testimony that the grease on the handle was not the type the railroad used to lubricate switches and that the switch appeared to have been vandalized. Additionally, there was testimony that *it is the responsibility of the men working to inspect the equipment and tools that they work with to be sure that they are safe to use.* (Emphasis added.)

554 So. 2d at 439. Even a cursory review of the opinion reveals that the court's purported misstatement of law was not a statement of law at all; it is a statement concerning evidence presented at trial. The Alabama Court of Civil Appeals had not begun its discussion of the law of the case and had not made any observation concerning the burden of providing a safe workplace to anyone and *a fortiori* did not place that burden on Williams.

The evidentiary basis for the court's observation ironically comes from the questioning of a witness called by

Williams. The following are questions to and answers from Aubrey Pollan, the plaintiff's immediate supervisor on the night of the incident:

Q. Mr. Pollan, it's the responsibility of you and the men working under you to inspect the equipment and tools they work with, isn't it?

A. Inspect the equipment and tools?

Q. That's right. Before they use equipment or tools, they're supposed to inspect it to be sure it's safe to use them, aren't they?

A. Safe working, in proper and safe working order; is that what you're saying?

Q. Yes, sir.

A. To the best of my knowledge, that's so.

Q. That's written in safety rules and operating rules, and it's just common sense, isn't it, Mr. Pollan?

A. Yes, sir."

(R.T. 176). This evidence was admitted without objection.

Trying so hard to make an issue after the fact, Williams argues belatedly in the Statement of the Case portion of his Petition that the Alabama Court of Civil Appeals erred in accepting this evidence. Williams writes:

On appeal, the Alabama Court of Civil Appeals referred to a railroad rule requiring employees to inspect tools and appliances before using them. The court should have applied *Shenker* and rejected this evidence. It should have stated the rule of *Shenker*, that the railroad had the duty of inspecting the switch before sending Mr. Williams to throw it. Instead the Court of Civil Appeals enhanced the railroad's rule, relieved the railroad of its duties under *Shenker*, and placed those duties on Mr. Williams.

(Williams Petition at 5-6.)

Williams wants this Court to reverse the Alabama court for acknowledging evidence from which contributory negli-

gence could be inferred. The argument was never presented below, and further, the railroad is entitled to present such evidence. That evidence can include the violation of railroad safety rules. This Court, federal courts of appeals and state appellate courts have ruled that violations of railroad safety rules are admissible to show the contributory negligence of the injured employee. See e.g., *Tennant v. Peoria & P.U.R.R. Co.*, 321 U.S. 29, 43 (1944); *Atchison T. & S.F. Ry. Co. v. Ballard*, 108 F.2d 768 (5th Cir.) cert. denied, 310 U.S. 646 (1940) ("A violation of specific rules though, will constitute negligence just as their observance by others, will, in relation to the violator, constitute due care."); *Nickell v. Baltimore & O.R. Co.*, 347 Ill. App. 202, 106 N.E.2d 738 (1952) and *Wilson v. Norfolk and Western Ry. Co.*, 109 Ill. App. 3d 79, 440 N.E.2d 238 (1982). The jury was entitled to consider any violation of the railroad safety rules in deciding questions of liability and damages in this FELA case. The Alabama Court of Civil Appeals' reference to that evidence, and its deference to the jury's consideration of that evidence, is proper.

The most disturbing aspect of Williams' editing of the Alabama Court of Civil Appeals' opinion to make an observation about testimony appear to be a statement of law is the manipulative and misleading nature of such a tactic. Williams begins his Petition by quoting the Alabama Court of Civil Appeals' opinion. He does not place the quote in any context, nor does he indicate that he is not quoting the full sentence used by that court. Indeed, he reproduces the quotation a second time (Williams Petition at 8), again without citation, and without ellipsis or any other indication that he is altering the context and the meaning of the court's opinion.

After repeating the abridged quotation in the "Reasons for Granting the Writ" section of his Petition, Williams writes that the Alabama Court of Civil Appeals "enhanced" the railroad rule and held that the employee must inspect his equipment and tools to "be sure that they are safe to use." (Williams petition at 8). This use of the quotation wholly mischaracterizes what the Alabama Court of Civil Appeals wrote. The part of the sentence omitted by Williams clearly

indicates that the Alabama Court of Civil Appeals was reviewing the evidence presented at trial. The sentence is not a ruling that the employee must provide himself a safe workplace. The sentence is not even dicta. It is a recitation of evidence offered. This patent mischaracterization of that court's opinion exceeds the bounds of zealous advocacy and subverts this Court's effort to reach a just result.

Williams asserts, by uttering the oft-quoted sentence fragment, that the Alabama courts have made "Mr. Williams an insurer of the safety of the switch" (Williams petition at 6); have shifted "the duty of supplying reasonably safe and suitable appliances from the railroad company to Mr. Williams" (Williams petition at 7); have contravened both *Texas & Pacific Railroad Co. v. Archibald*, 170 U.S. 665 (1898) and *Shenker v. B. & O. Railroad Co.*, 374 U.S. 1 (1963). (Williams petition at 7-8); and have contravened *Seaboard Railroad v. Gillis*, 294 Ala. 726, 321 So. 2d 202 (1975) (Williams petition at 8-9). Despite the Petitioner's allegations to the contrary, the Alabama courts have not contravened federal law, this Court's precedent, or Alabama precedent. The Alabama Court of Civil Appeals reviewed the evidence in a case in which a comparative negligence standard applies and determined that the evidence could have supported a jury finding of the railroad's negligence and the Petitioner's contributory negligence in any relative degree. Such an examination and analysis is consistent with, not contrary to, the Federal Employers' Liability Act and the cases cited by Williams.

The jury, not the Alabama Court of Civil Appeals, apportioned the relative degrees of negligence in this case. The jury was charged as to the duty on the railroad to exercise reasonable care to provide Williams a reasonably safe place to work and as to Williams' obligation to exercise reasonable care for his own safety. Those charges were given without objection from Petitioner's counsel. The charges read:

One of the duties of the defendant to the plaintiff is to provide a reasonably safe place to work. In doing so, the defendant must use reasonable care to

provide for the safety of its employees. Of course, the defendant is not a guarantor or insurer of the safety of the place to work. The extent of the defendant's duty is to exercise reasonable care under the circumstances, at the time and place in question, to provide the plaintiff with a reasonably safe place to work. (T. 573)

★ ★ ★

When I speak of negligence on the part of the plaintiff, I mean it in the same general sense as I have previously described negligence to you. That is, in one sense, the failure to exercise reasonable care or that failure to perform a legal duty. It was the continuing duty of the plaintiff to exercise reasonable care under the circumstances for his own safety and protection. (T. 576)

This is the language upon which the jury was asked to decide the case. The Alabama Court of Civil Appeals simply said that Judge Hanes did not abuse his discretion in denying Williams' motion for a new trial.

Williams' fictional account of what has transpired below would be incomplete without a concluding plot twist. Accordingly, Williams adopts yet another approach and argues in the final paragraph of the argument portion of his Petition that a greased switch handle was not foreseeable. The foreseeability of grease on the switch handle was never an issue. What was an issue was the possibility that *something* could be wrong with the switch that an inspection or simple observation could have disclosed. However Mr. Williams may characterize the truth, the jury decided that Mr. Williams' negligence caused the great majority of his injuries. The jury was the fact finder and the ultimate arbiter of truth in this case.

III. THE CLAIM PRESSED IN THE PETITION IS SO INSUBSTANTIAL AS TO PRECLUDE THIS COURT FROM TAKING JURISDICTION.

In order for this Court to exercise jurisdiction over the judgments of state courts, there must be something more than a mere claim that a federal question exists. *Parker v. McLain*, 237 U.S. 469, 471 (1914); *Wabash Railroad v. Flannigan*, 192 U.S. 29, 38 (1903); *New Orleans Water Works Co. v. Louisiana*, 185 U.S. 343, 344 (1901); *St. Joseph & Grand Island Railroad v. Steele*, 167 U.S. 659, 662 (1897). "Our jurisdiction to review the judgment of the highest court of the State turns upon whether a federal right was specially set up or claimed in that court and denied by its decision. . . . And to be effective for this purpose the assertion of the Federal right must not be frivolous or wholly without foundation. It must at least have fair color of support. . . ." *Parker v. McLain*, 237 U.S. at 471.⁶

Williams' argument that the Alabama Court of Civil Appeals' decision was based on an misinterpretation of the FELA is specious. A properly instructed jury made the determination as to the relative degrees of negligence and contributory negligence of the parties to this action.⁷ To suggest that the Alabama Court of Civil Appeals affirmed the judgment entered on that verdict because it made mistakes concerning the duty of an FELA defendant to exercise reasonable care to provide a reasonably safe place to work is

⁶ Under 28 U.S.C. § 1257, Williams can assert that this Court has jurisdiction only if he has a "title, right, privilege or immunity . . . specifically set up or claimed under the" Federal Employers' Liability Act. The other avenues of review outlined in § 1257 are inapplicable to this case. The railroad does not concede that Williams has properly set up such right or privilege under the FELA. Confusion arises because Williams originally argued that the verdict was inadequate. He presented the issue pressed in this Court for the first time in an application for rehearing before the Alabama Court of Civil Appeals.

⁷ No ground raised in Williams' post-trial motions or appellate briefs suggested that the jury was improperly instructed. Further, no objection was raised at trial as to the court's charge with respect to any issue raised in the Petition.

Williams' attempt to obtain certiorari when he is not entitled to it.

The issue before the Alabama Court of Civil Appeals and the Supreme Court of Alabama was whether Judge Hanes, the trial judge, abused his discretion in denying a new trial motion which challenged the adequacy of the damages awarded. The Alabama Court of Civil Appeals held that the denial of a new trial was not an abuse of discretion because the evidence at trial and the applicable law could explain a verdict of one dollar. The Alabama Court of Civil Appeals did not misconstrue the applicable law in affirming Judge Hanes' actions. The court simply held that the evidence at the trial of this civil action could have supported a finding of no negligence of the defendant and contributory negligence of the plaintiff. Because the FELA incorporates a pure comparative negligence standard, evidence which could support a finding of slight negligence of the defendant and substantial contributory negligence of the plaintiff mandates affirmance of the trial court.

The Supreme Court of Alabama originally agreed to hear the case and subsequently quashed the writ as improvidently granted. No majority opinion was submitted with the order. Three members of the Supreme Court of Alabama dissented from the decision to quash the writ and wrote a lengthy dissent. That dissent never addresses the Petitioner's contention, raised before that court as well as before this Court, that the Alabama Court of Civil Appeals misconstrued the FELA by imposing on the Petitioner the responsibility for providing himself a safe place to work.

The dissenting justices agreed with the majority that the contributory negligence issue was properly submitted to the jury, and the jury was properly instructed on the comparative negligence doctrine. Their disagreement arose as to the adequacy of the verdict. The dissenting justices thought the verdict was inconsistent with the preponderance of the evidence. Neither the majority, nor the dissenting members

of the court, even acknowledged the “burden shifting” argument of the Petitioner.⁸

The Alabama courts’ refusal to indulge in the analysis suggested by the Petitioner is significant. Although both the Alabama Court of Civil Appeals (on motion for rehearing) and the Supreme Court of Alabama were briefed on the issue, neither court understood the court of civil appeals’ decision as improperly burdening the Petitioner—the only issue which has been presented to this Court for review. The Alabama courts properly understood that the only issue of any merit which had been presented for their review concerned the adequacy of the damages awarded by the jury which heard the evidence in this case. The Petitioner apparently understands that there are no special and important reasons compelling this Court’s review of such a claim under Rule 10.1 of the Rules of the United States Supreme Court, effective on January 1, 1990.⁹ Rather than make such a claim, the Petitioner attempts to manufacture an issue by misconstruing the language in the Alabama Court of Appeals’ opinion. The effort utterly fails, and in so doing, precludes this Court from taking jurisdiction.

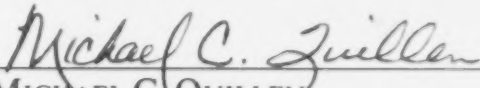
⁸ Because the “burden shifting” argument was developed by the Petitioner as a response to the Alabama Court of Civil Appeals decision affirming the denial of the new trial motion, the Petitioner has not, and cannot, comply with Rule 14.1(h) of the Rules of the Supreme Court of the United States, effective on January 1, 1990. Rule 14.1(h) requires the Petitioner to specify: (1) the stage in the proceedings, *both in the court of first instance and the appellate courts, at which the federal questions sought to be reviewed were raised . . .* (Emphasis added.)

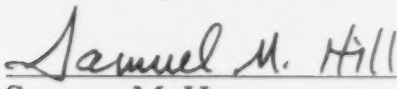
⁹ In *Southern Ry. v. Bennett*, 233 U.S. 80, 86 (1913) this Court ruled that a question concerning the amount of the verdict “. . . does not present a question for reexamination here upon a writ of error.” See also, *Louisville & Nash R.R. v. Halloway*, 246 U.S. 525, 529 (1917). Apparently, Williams has abandoned his challenge to the adequacy of verdict.

CONCLUSION

Williams has mischaracterized a state appellate court's language and has manufactured arguments in his Petition for a writ of certiorari in an effort to recover more than one dollar in damages. The jury reviewed the evidence and awarded what it thought just; the trial court ruled that the new trial motion based on inadequacy of damages was due to be denied; the Alabama Court of Civil Appeals affirmed that decision twice; and the Supreme Court of Alabama effectively affirmed as well. The Petitioner's blatant efforts to change the focus in this case are obvious. The burden of providing a safe workplace in an FELA case is not a complicated issue. It is the subject of pattern jury instructions which were given in this case. To suggest that the Alabama Court of Civil Appeals does not understand that burden and that its opinion is tainted by incorrect notions of burden allocation is the most spurious of arguments. The petition for a writ of certiorari raises no meritorious issue and should be denied.

Respectfully submitted,


MICHAEL C. QUILLEN
(Counsel of Record)


SAMUEL M. HILL
CABANISS, JOHNSTON, GARDNER,
DUMAS & O'NEAL
1700 AmSouth-Sonat Tower
P. O. Box 830612
Birmingham, Alabama 35283-0612
(205) 252-8800

*Attorneys for Illinois
Central Railroad Company
Respondent*

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been served upon counsel for by placing same in the United States mail, properly addressed and postage prepaid, to Frank O. Burge, Jr., Burge & Wettermark, P.C., 2300 SouthTrust Tower, Birmingham, Alabama 35203.

This the 13th day of March, 1990.

Michael C. Ziller
OF COUNSEL